UNITED STATES DEPARTMENT OF ENERGY

GUIDELINES FOR PHYSICIANS PANEL DETERMINATIONS ON WORKER REQUESTS FOR ASSISTANCE IN FILING FOR STATE WORKERS' COMPENSATION BENEFITS

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A G E N D A

P R O C E E D I N G S

9:00 a.m.

Opening Remarks

MR. CARY: Good morning and thank you for attending today.

I'm Steve Cary, the Acting Assistant Secretary for Environment, Safety and Health, and the Acting Director of the Office of Advocacy.

I'm joined by Ms. Kate Kimpan, our Senior Policy Advisor, and Dr. Joe Falco, a medical doctor who works with us in the Advocacy Office.

We're here today to hear public comments on the proposed rules and procedures that DOE will use to carry out its responsibility under the Energy Employees Illness Compensation Act. In shorthand, we refer to this as the Physicians Panel Rule.

Subtitle D of the Act authorizes the Secretary of Energy to provide assistance to DOE contractor employees who are ill due to workplace exposures to a toxic substance. If a worker is eligible, DOE submits the worker's application to a physicians panel whose members were chosen by the Department of Health and Human Services.

If a physician panel makes a positive determination that the claim is valid, then the Advocacy Office will assist the applicant in filing a claim with the relevant state workers' compensation system. In addition, DOE will not contest the claim and, to the extent permitted, will direct the DOE contractor not to contest the claim.

We take the public comment process very seriously. At the same time, we believe it's very important to have the physicians panels operating as quickly as possible. When we issued the proposed rulemaking in September, we announced a 30-day public comment period at a public meeting in September. Following the tragic events of September 11th, and at public request, we postponed the meeting until today and extended the comment period by 60 days.

Given that there may be many who have not traveled to Washington today, we, my office, will hold a second public meeting outside of Washington, D.C., before the end of this month. We haven't finalized the exact date or place for the location, but we're going to choose a location that's readily accessible to the largest number of interested parties.

We will notify you within a few days of the

place and the location for our second public meeting. I'd like to emphasize before we get started this morning, also, that a written comment has the same validity as a delivered comment here, and it will have the same impact as a comment made before our group.

So, let me just lay out a few ground rules. The speakers will make their remarks in the order indicated on the sheet that we've passed out, and we will ask you to limit your remarks to 10 minutes. Members of the panel are here to listen and are not available to respond to comments or questions, although we may ask questions of a clarifying nature.

Anyone wishing to speak, who did not pre-register, will speak at the end in the order in which they signed in today. We do not plan to take a lunch break, but if we have enough speakers, and we go beyond the lunch hour, we'll do that.

As a reminder, if you are here as an attendee and have not signed in, please do so, so we have an accurate public record. Once again, thanks for being here.

I'd like to introduce the first speaker at our hearing this morning. Please come up to the table so we can get your remarks as part of the formal

record.

The first speaker this morning will be Jordan Barab of the AFL-CIO.

Opening Statements

MR. BARAB: Thank you.

My name is Jordan Barab, and I'm representing the American Federation of Labor and Congress of Industrial Organizations.

Fifteen unions of the AFL-CIO represent workers covered under the Energy Employees Occupational Illness Compensation Program Act of 2000. The AFL-CIO is very interested in the smooth functioning of this program that affects several hundred thousand workers, former and current employees, many of whom have suffered and sacrificed their health and sometimes their lives on behalf of our nation during the Cold War.

I will cover some of the major problems with these regulations, leaving some of the more detailed analysis to those unions, organizations and workers who are more intimately affected and who will follow me.

We appreciate this opportunity to testify before you. I also want to take this opportunity to

thank you for organizing a field hearing, in addition to the hearing in Washington. We feel that'll facilitate getting as much information as you'll need on this -- on these regulations.

We feel strongly, however, that these draft guidelines fail to address the expressed and clear intent of Congress to assist workers with their state compensation claims for occupational disease related to working in the Department of Energy Nuclear Weapons Facility.

We request that you modify these guidelines so that this process will provide just and adequate compensation to our Cold War veterans, a goal that the Department of Energy, the AFL-CIO, and the hundreds of thousands of workers and survivors affected by this program all hold in common.

As currently written, instead of following Congress's intent to create a uniform system to compensate nuclear weapons workers where state workers' compensation systems have failed, these draft guidelines impose numerous obstacles, many of which are already contained in the state workers' comp programs.

I will go through some of our issues with these guidelines.

Number 1. Prescreening by DOE, based on state criteria, is unsupported by the law.

State workers' compensation systems are notoriously ill-suited to provide workers' compensation for occupational disease. The reasons are well known, arbitrary statutes of limitations, complicated burdens of proof with respect to causation, that often change overtime, difficulty in determining which employer was responsible for the illness which was often the case with nuclear workers. Multiple employers may have existed over a long period of time.

These barriers have for decades frustrated the ability of workers to obtain compensation for illnesses suffered from working in this industry, and it was to overcome these barriers that Subtitle D of the law was written and passed by the United States Congress last year.

The intent of Congress in passing this law was to compensate workers for work-related harm and for the Federal Government's failures to prevent such harm. While the Department of Labor program covers radiation-related cancers, silicosis and chronic beryllium disease that are specifically addressed in the law, the diseases covered by Subtitle D were also recognized as

real and as needing assistance from the Department of Energy to assure just and adequate compensation for workers affected by these diseases.

There is nothing in the text or intent of the law that encourages or permits the process in Paragraph 852.6 whereby DOE prescreens workers' claims by using the "applicable" criteria that form the existing state barriers to compensation that this law was intended to overcome.

There's absolutely nothing in the text of the law nor in the congressional history nor in the realm of common sense that indicates that DOE should have the power to "provide assistance to only those applicants that satisfy the identified applicable criteria" as stated in Paragraph 852.6(c).

Section 3661 of the Energy Employees Compensation Act states clearly that the purpose of the agreements between DOE and the states is to "provide assistance to the Department of Energy contractor employees in filing a claim under the appropriate state workers' compensation system."

Miriam Webster Dictionary defines the word "assist" as to give support or aid. It is extremely difficult to conceive that by essentially recreating on

the federal level the same obstacles that plague workers' attempts to receive compensation for occupational disease on the state level and essentially making this a precondition of consideration by the physicians panel, that DOE is somehow "supporting, aiding or assisting" workers to receive the compensation that was intended by Congress in passing this Act.

Number 2. Applying state workers' comp criteria at the federal level won't work.

In addition to being a bad idea on its face, it's simply not feasible to recreate the state determination criteria on the federal level in a way that could ever function effectively. At its very best, the final decisionmaking relating to occupational disease of state workers' compensation systems is highly idiosyncratic.

These are not cookie-cutter decisionmaking processes that can be arbitrarily beamed up and recreated on the federal level. What we have here is essentially a workers' compensation equivalent of nation-building, taking a system that has evolved from the primordial ooze of decades of legal decisions and interpretations with all the accompanying defects,

distortions and warts and then imposing that flawed system on top of a structure that is ill-equipped by either history or resources to be able to recreate even the original flawed system, much less the "efficient, uniform and adequate compensation" system that Congress envisioned this Act to create.

Number 3. The role of the physician panel should be only to determine causation.

Even worse than DOE prescreening applications before they reach the physicians panel is the idea as stated in Paragraph 852.11(c)(4), which, if requested by DOE, gives the physicians panel the responsibility of making a finding as to whether the specified state criteria is satisfied.

There’s nothing in the federal law nor in state law or practice that requires or permits physicians to make legal findings of compensability. In fact, the text of the law states that the purpose of the physicians panel is to determine "whether the illness or death arose out of and in the course of employment by the Department of Energy and exposure to a toxic substance at the Department of Energy facility."

There’s nothing that refers to a judgment by

the physicians panel as to whether a case complies with any state legal criteria.

Furthermore, the law instructs HHS to choose panel members with experience and competency in diagnosing occupational illnesses, not experience and expertise in evaluating the legal criteria of each applicant's case. In fact, the idea that physicians could even be found that would be willing or able to interpret legal compensability in not just one but numerous different state laws defies belief.

Number 4. Review of physician panel decisions is too vague.

The law is very specific in stating that DOE must accept the decision of the physicians panel "in the absence of significant evidence to the contrary", taking into account information considered by the panel, any new information, on the basis for the panel's decision.

Instead, defining what is meant in the law by "significant evidence to the contrary", the guidelines add a number of other criteria that DOE program offices are allowed to use. Quality assurance purposes and "any other situation in which the program office concludes there is good cause for re-examination or

doubt about whether the available evidence supports the original panel determination".

While doubt, quality assurance and good cause are not explicitly defined in the guidelines, it seems to me highly questionable whether they meet the "significant evidence" criteria stated in the law.

Number 5. DOE should pay for the development of the application's medical documentation.

It seems clear that in stating that DOE shall assist the applicant to file a claim under the appropriate state workers' compensation system, that DOE should also pay for medical tests or procedures that the physicians panel require to make a final decision regarding causality of disease.

Finally, from my understanding of the law, it appears clear that the Department of Energy has misunderstood the intent of Congress in passing Subtitle D of this Act. While the diseases covered in the Subtitle D are not the radiation-related cancers, silicosis or chronic beryllium disease covered by the DOL program, like those diseases, they affect the same workers who, in the words of the congressional findings, were put at risk without their knowledge or consent, and like the victims of these other diseases,

these workers have fought for and been denied state workers' compensation benefits due to the opposition of contractors in the Department of Energy itself.

Instead of detailing how DOE is going to provide meaningful assistance and compensation to these workers, these guidelines not only resurrect on the federal level the barriers the law is attempting to overcome, but these guidelines have gone on to create some wholly new problems.

It's the opinion of the AFL-CIO that these draft guidelines represent a major step backwards and in no way comply with congressional intent. Only if Congress had asked DOE not to assist Department of Energy contractor employees from filing claims but to hinder such applications with the process the DOE is attempting to create had been an appropriate response to congressional intent.

This law was passed on a bipartisan basis to correct the wrongs of the past and to provide long-overdue compensation for the civilian soldiers of the Cold War. We can never truly repay them for their service or make them whole again is obvious, but the Department of Energy does not even seem to be making a good faith attempt to assist them to receive the

compensation they deserve is a major disappointment.

Thank you, and I'd be glad to answer any questions.

MR. CARY: Thank you very much.

The next speaker this morning will be Dr. Laura Welch, representing the Worker Advocacy Advisory Committee.

DR. WELCH: Good morning.

I'm Laura Welch. I'm an occupational physician, and I'm here on behalf of Steve Markowitz, who is a physician also on the Worker Advocacy Advisory Committee.

Steve asked if I could present his comments. I am also on the committee and have reviewed his comments. The comments are longer than what I'm going to discuss in the written comments, and I'm going to highlight some of the points.

So, I'm presenting the comments on behalf of Steve but also on behalf of the Worker Advocacy Advisory Committee, which is a federal advisory committee which was appointed by the Department of Energy to provide the department with advice about the portion of the Energy Employees Occupational Illness Compensation Program that addresses state workers'

compensation claims for occupational diseases, and the comments I'm presenting today were endorsed by a majority of the committee.

Also attached to my comments are a letter sent by the committee to Secretary Abraham in August which detail and were reviewed by all the committee and was a consensus of the committee.

There are several areas. The first one is the use of state-based workers' compensation criteria, and we thought that was really one of the most significant problems with the proposed regulation.

The proposed regulation would require a claim meet state criteria as determined by the Department of Energy, and we think this is a fundamental flaw with the regulation.

The proposed approach undermines the clear intent of the Act to facilitate the flow of workers' compensation to claimants with occupational diseases caused by toxic exposures.

In Subpart D, Congress addressed specifically some of the most egregious barriers that prevent workers from obtaining needed compensation benefits. As part of this, the Congress established physician panels as a way to make expertise in occupational

medicine available throughout the nation, and Congress directed the Department of Energy not to contest claims in which the physician panels have found occupational causation.

The purpose of Subpart D was to encourage close cooperation between the Department of Energy and state workers' compensation systems to overcome a historic pattern of denial of workers' compensation benefits for Department of Energy workers and to reconcile the current state workers' compensation systems with the needs of these Department of Energy workers that are not well served.

So, it then makes absolutely no sense for the Department of Energy to resurrect voluntarily and through rulemaking the barriers in state workers' compensation systems that have been used to deny compensation to deserving workers in the past.

Through the proposed rules, the Department of Energy voluntarily recreates all of the old barriers to the payment of compensation. It makes no sense for the Federal Government to undertake a very substantial effort to provide for proper review of medical causation by physician experts drawn from around the nation not to contest valid claims, only then to revise

a set of state-based legal and administrative barriers to deny otherwise-valid claims. To do so contravenes the will of Congress.

We believe the proposed use of state-based criteria is flawed because we find no evidence in Subpart D of the EEOICPA that the Department of Energy has the authority to use state-based criteria in this manner. We believe the intent of the legislation is for the validity of a claim under Subpart D to be determined based on the physician panel determination.

In place of using additional state-based criteria, we have proposed the equivalent of voluntary payment of workers' compensation claims that many employers undertake under existing state systems when the employer is satisfied with the merit of the claim. In essence, employers may waive many defenses when they choose to pay these claims and waive them for a variety of reasons.

Thus, we argue that given the underlying intent of the Act to rectify past injustice, the Department of Energy should apply relatively liberal standards. We believe that Item 3 in Section 852.5 and Items B and C in Section 852.6 should be deleted, and the remainder of Section 852.6 be written in its

entirety.

The second issue is an issue of causation and how it’s defined in the proposed language.

We don’t believe that Section 852.7 gives adequate guidance to physician panels about causality, and we strongly recommend replacing the word "cause" in Part B with the word "contributed, aggravated or caused". This is in accordance with how many state workers’ compensation systems have defined causation.

In addition, we disagree that the physician panels should use state-based criteria to make judgments about causality. The proper domain of physicians with expertise in occupational medicine is to render a judgment about medical causation. That judgment of medical causation will not vary from state to state but asking the physicians to look at state-based criteria will cause variety from state to state, and so we recommend that 852.11(c)(4) be deleted.

The third point addresses review of physician panel determinations, and we think that the proposed language gives the Department of Energy excess freedom to review, re-review panel determinations, and more detail on that is in the written comments.

We note that the proposed rules make no

allowance for the Department of Energy to pay any medical expenses associated with claims, and we think that's the legitimate, important and limited role that the department can play in this rule.

The department should pay for expenses claimants incur specifically as a result of medical tests that the physician panels request in order to make a final determination. The amount of this testing will be limited, and we'd like to point out that in the absence of such payments, the Department of Energy will generate enormous ill will from claimants who are outside the panel to undergo tests and to pay for them themselves and then his claim is denied, so they're worse off financially than they were before they sent in an application, and as we've pointed out, we think this will be very limited, based on some previous experience with the Fernald Panel.

We'd like to point out that no process is in place for development of full occupational histories and exposure records for claimants, which is an essential responsibility, and we urge the department to make sure sufficient staff and assistance is available to fulfill this responsibility.

The proposed regulations suggest the entire

burden for development of necessary information for a claim rests on the claimant, but we would like to see additional sections on how the Department of Energy is going to assist the claimants.

Thank you. I have summarized very quickly what the advisory committee has put together, and as I said, there's more detail on these in the written comments.

MR. CARY: Thank you very much.

The next speaker is Gaylon Hansen, who's a worker at INEEL.

MR. HANSON: I'd like you to know that I'm a little bit out of my comfort zone here this morning. I'd like to give a little history about myself.

My name is Gaylon Hanson. I've worked at the Idaho National Engineering and Environmental Laboratory for the last 29 years as a welder first class. I started in the early '70s on the LOFT Project and finished the LOFT Project. I worked on it from cradle to grave.

I also worked in the fuel assembly for the LOFT Fuel, and most recently, I've worked with the transfer of the TMI fuel to dry storage at Intec.

I'm not an expert on workmans' compensation,

but I can tell you that I don't know of anyone at the INEEL who has been awarded compensation for an occupational disease. I have noise-induced hearing loss myself, but the state does not cover noise-induced hearing loss, and I see that the DOE refuses to include hearing loss in the proposed rules.

It's a real injustice to workers in weapons complex where noise levels are incredibly high, and I believe that our medical testing program has found that almost 90 percent of the workers tested had hearing problems. There's one gentleman who actually was involved in a boiler explosion several years ago at the INEEL.

At that time, the state bought him one hearing aid which was a contraption that he didn't use. Once this program was put in place, we filed a state claim with the state workmans' comp over the phone, and apparently they gave him the okay to say yeah, you're covered, go get it. He ordered the hearing aid. When the hearing aid came in, they refused to pay for it. He handed it back to the vendor that give it to him. So, hearing loss, even though it's from an accident, was denied in that case.

Before I begin discussing the proposed rules,

I want to talk a little bit about the INEEL and its hazards and why I think the state compensation system is the wrong vehicle for compensating DOE workers for diseases caused by toxic exposures in the workplace.

As a worker, I feel I work for the Federal Government, not the EG&Gs, the Lockheeds, the Bechtels, etc. I feel we should have been covered under a federal workmans' comp rule, one that was -- would be more -- do more justice to us workers in federal jobs.

I have a good friend that works for the Bonneville Power Administration. This gentleman, I talked to him about our plight with nuclear workers, etc., and he said, "Well, you should have worked for Bonneville Power. We fall under that federal program. We don't have to worry about the state." This is disheartening to me.

You know, the INEEL covers 890 square miles. It's almost the size of Rhode Island, and it was once the site of the largest concentration of nuclear reactors in the world. There's 52 nuclear reactors were built there over the years.

INEEL workers have and still have numerous hazardous exposures, including radiation, uranium, plutonium, asbestos, lead, cadmium, chlorinated

solvents, mercury, beryllium, acids and nickel. It's mindboggling the legacy that we have there.

You know, I used to ride the bus with a gentleman named Clint Jensen. Some of you may know of the name. I worked with him when he was a pipefitter in our group. He transferred down to the Special Machine Capability Project, the one that makes the shielding for depleted uranium shielding for Army tanks.

Jensen was a production technician with over 20 years of experience on the job, and, you know, he started getting sick and raised concerns about it with the contractor about his exposures with this depleted uranium and other unknown chemicals.

The contractor denied him medical leave and workers' compensation. Jensen became a whistleblower, and for this, he was ostracized at the plant. I got on the bus. No one would set with this individual. It was like he wasn't there. I sat with him on the bus, tried to be a friend to him and let him know that he had some support from federal workers, and this guy is a sick person, and he's not a person that I feel would have dreamed this up.

They actually had -- DOE and DOL hired an

occupational medical physician to investigate his complaint, and here's what she found. Lack of on-site expertise in industrial hygiene at SMC, little sampling data for any substance, except depleted uranium, and the bioassay program at SMC required a full review, and there was spot checks for basic elements of an industrial hygiene were lacking.

You know, there's no chemical data to speak of at the INEEL. They kept pretty good records of radiation exposures, but when it comes right down to chemicals, they really have nothing. In 1997, when we started the Worker Health Protection Program, we had to do the needs assessment.

We met with Dr. Creighton, who was a site medical director, in his office, and he -- we asked him what he had on -- for records for chemicals on site, and he pointed to the shelf on the wall that had a few boxes in it, but he says, "We're in the process of designing that perspective chemical monitoring program for the site."

Under Mark Griffin's direction, he's an industrial hygienist that we use for PACE, I conducted over 20 risk mapping sessions at the INEEL, and I'd like to relate a story of a reporter who was

interviewing a bank robber, and she asked the bank robber, "Now, why do you rob banks?" He said, "Well, that's where the money is."

So, what I want to say is who else better knows those sites and what the hazards they dealt with and the things they were exposed to and in the amounts of than the workers that actually worked in these hazards that was there?

We talk a little bit about risk mapping here. For those of you who don't know what risk mapping is, visualize in your garage, you and your wife go out to your garage. You're going to identify hazards in the garage. There may be chemicals on a shelf, pesticides, herbicides, etc. There may be grinders, welding machines, drill presses. These are hazards that we know that are in our own garage at home, and in our home, we also have hazards in the kitchen, under the sink, above the -- in the medicine cabinet.

Well, just like in our homes, things change. When we have small children in our home, we took care of things different than, say, there's just two. Well, at the INEEL, these buildings have been used for many different processes over the years. What one worker sees as the layout of the plant, another worker sees it

completely different. They have different chemicals, different hazards at different time frames. But it is an excellent tool and vehicle for reconstructing these hazards that they were exposed to.

Although I'm not an expert on workmans' compensation, I have become familiar with provisions of the Energy Employees Occupational Illness and Compensation Act 2000. I educate former workers on the Act during educational workshops we hold as part of the Worker Health Protection Program every two weeks. I think our program is unique for this, educating our former workers, and I should not be surprised that DOE has definitely bypassed the intent of this Subtitle D of the EEOICP.

Instead of setting up procedures that would actually make it easier for these workers to file their workmans' comp claims, the DOE has proposed rules that just set up another layer of bureaucracy whose final outcome is subject to the worker to the state compensation hurdles the Act sought to avoid.

You know, many DOE workers, including myself, we developed a cautious optimism about the DOE in the past years. In the workshop, we got up, and we told our folks that, you know, DOE is working with you folks

on this. We're trying to make restitution for things that's been done in the past, but, you know, I'm starting to -- after looking at some of the changes here, I see that maybe you may once again be reverting back to what we used to visualize.

Section 852.3 of the proposed rule calls for an individual to obtain application for review and assistance from the program office, the resource center for many DOE-sponsored Former Worker Program. In order to provide any meaningful assistance to these claimants, the former worker needs to -- we need to reconstruct these chemical exposures at the facility, and I feel we are the only ones in a unique position to be able to do this.

We know the workers, and we have their trust, so we can conduct more interviews and risk mapping sessions, and we have worker investigators that has actually worked with NIOSH and dose reconstruction on-site that are willing to help us with this program.

DOE must provide some resources for us to do this and allow the Former Workers Program to conduct these exposure assessments. It is our experience that very little, if any, information on exposures to toxic agents was included by the contractor or DOE within an

individual’s personnel file.

If I went and asked for my personnel file, radiation records, yes, occupational hazards, other than lead testing now, which has only come into place in the last 10 years, 10 years ago, I didn’t even know what an industrial hygienist was on site. We relied upon what was called "health physicist", and that was a pretty impressive title, I thought. We expected them to help us identify the hazards. We had safety engineers did the same, but now we have a variety of trained folks in the workplace as industrial hygienists. Anyway, there’s no data out there.

You know, I very much fear, and I want to say this from the bottom of my heart, that no worker will ever receive a state compensation award, at least in Idaho. The proposed rule states that DOE may, to the extent permitted, not allow -- not an allowable cost under DOE contract is no deterrent because the contesting the claim will be cheaper than paying it once the claims are contested.

If we have a chilling effect -- it will have a chilling effect upon the workers filing claims. The proposal says that the contractors will pass on the expense of the claims to DOE from the state, but I

believe that this will not be effective unless there's something written formally that DOE does reimburse the cost of this compensation.

Dr. Creighton is on our advisory board, that we meet twice a year on the Worker Health Protection Program, and in a personal conversation from him, he pretty well told us that they are going to fight every claim that is placed in front of them. It's going to be the worker's burden of proof that this actually happened.

Subtitle D of the Act calls for DOE to review an application for only two things, the claimant worked for a DOE contractor and the illness or death may have been related to the employment at the DOE facility.

Now, DOE is now going to insert a third condition, that the worker meet state eligibility requirements before an application can be submitted to the physicians panel. DOE solicits comment on whether these proposed conditions are appropriate, and I would refer them back to the Act for guidance.

Under 7 of Section 3602 of the Act, Findings, the sense of Congress, it states, "Existing information indicates that the state workmans' compensation programs do not provide a uniform means of ensuring

adequate compensation for the types of occupational illnesses and diseases that relate to employees at these sites."

You know, how can DOE justify allowing states to identify the applicable criteria used to determine the validity of the compensation claim before the claim even goes to the physician panel? I thought the purpose of the physicians panel was to overcome some of the obstacles of the state compensation system and set up uniform standards by which the physicians will determine whether the illness is job-related.

Further, since DOE has obligated itself the right to interpret state compensation laws and decide which cases should go to the physicians panel on the basis of state criteria for the consideration of admissibility of claims, the state agreements refer to the Act are to allow DOE to provide assistance to the sick worker in filing the claim under the appropriate state workers' compensation system, not to hamper it.

I'd ask you not to have another layer of bureaucracy placed before these workers, and when I say workers, I'm saying possibly the widows of these workers. It's very disheartening for me to work with these widows and see their plight when this is coming

down.

In closing here, you know, there's billions of dollars being spent on clean-up work at DOE facilities, and a fraction of that is being spent on workers who worked in the known hazards. During our educational workshops, we have people from around the INEEL seated at tables, and they discuss the shortcomings of the Worker Health Protection Program.

The people who work for the prime contractor, for instance, the Phillips, the Aerojets, the EG&Gs, the Lockheeds, the Bechtels, over the course of years has no access to prescription benefits once they reach the age of 65. They are asked to go out and find your own supplement, but if I worked for Argonne or if I worked for DOE, at age 65, I could have carried or I could carry as a supplement insurance my previous insurance which would give me prescription benefits.

So, we have hundreds of workers after 65 that are on their own, not available to get the prescription benefits. I feel this is a real inequity with the BBW Retirement Program. I mentioned it personally with Bab Cook when she was director at the site. It all boils down to funds, but nonetheless, I see them taking funds out of the DOE or our retirement program as an

incentive to pay workers to leave early, but they cannot cover this added benefits.

I feel that I'm the mouthpiece for thousands of other workers at the site, and I'd like to abbreviate what I've said here today, and I'll close. The state workman comp laws do not cover hearing loss. Asbestos is one that's never been covered in the state of Idaho. The INEEL is so spread out and complex, so many different hazards are there, and there is no data for chemical exposures and none in personnel files.

The only way to gather data is through former workers, through this risk mapping and worker investigators, and our contractor medical director personally told me that they would fight their claims.

DOE is not following the intent of Subtitle D. They have just set up another layer of bureaucracy. The Former Workers Program needs to reconstruct these chemical exposures at the facilities, and we need the resources to do this. We need a formal written requirement that DOE gets reimbursed for these costs of compensation. We don't need a third row that the worker meets the state requirements. Every state worker comp rules are different, as you well know.

No exposure records are there to back up

these claimants and their claims. DOE decides what cases goes to the state, and why is DOE hearing our appeal on a decision? They hold a hearing on appeal for decision which actually was issued by the DOE office. I mean, they are listening to an appeal by their own people, you know, and I haven't touched on state laws, you know. There's such things as filing times that we've had to work with, etc.

I just hope that what I've said here today will be taken back to your folks, and hopefully we'll have a kinder, gentler law.

Thank you.

MR. CARY: Thank you very much.

The next speaker this morning is James Ellenberger from PACE.

MR. ELLENBERGER: Thank you, Mr. Secretary, for the opportunity to appear here and to comment on these rules.

I want to particularly thank Gaylon Hanson, who we just heard from, who's a PACE member from Idaho Falls, Idaho, and Jeanne Cisco, who's a PACE member from Portsmouth, Ohio, who have traveled here to testify on these rules. They are just two of thousands of PACE members and indeed tens of thousands of union

members in the 12 unions that Jordan Barab mentioned to you at various DOE sites who would like to be able to comment and have some input on these proposed rules.

I apologize to those in the audience for not having sufficient copies of my testimony to make them available to all of you. I was hoping that the department would have copied them. For any of those who would like to have copies, please see me at a break or after the testimony, and I'll take your name and gladly send you a copy of my remarks.

My name is Jim Ellenberger. I am a consultant to the Paper Allied Industrial Chemical and Energy Workers International Union. It is a union that represents over 320,000 workers in the chemical, energy, pulp, paper, and nuclear fields, auto supply fields, in this country.

We represent workers, production workers at 11 DOE sites. We represent tens of thousands of workers, former workers who worked at numerous DOE facilities and for DOE contractors and atomic weapons employers.

I also serve, as Dr. Laura Welch and Jeanne Cisco, here in this hearing as a member of the Federal Advisory Committee to the Department of Energy's Office

of Worker Advocacy. This committee, as you know, was appointed by Secretary Richardson to provide advice and guidance to the department as it was moving forward to implement its responsibilities under the Energy Employees Occupational Illness Compensation Program Act that was passed in October of last year.

I, for nearly two decades, covered workers' compensation for the AFL-CIO at the national level. I am recognized as a resource throughout the labor movement on workers' compensation issues. I know workers' compensation at the state level, and I'm recognized by those in the industry and in the employer community as someone who understands and knows workers' compensation.

I am one of the founding members of the National Academy of Social Insurance, and I serve on its Steering Committee on Workers' Compensation.

PACE has written to the Secretary and to the Deputy Secretary, and we have expressed to you, Mr. Secretary, our strong feelings and advice that we believe the department should have more than one hearing here in Washington and more than one hearing in the field.

As I look around, I mean, I don't want to

belittle anyone's participation here, but having one hearing in Washington, D.C., populated by people who don't work in this field, is really outrageous. These hearings ought to be in the field. They ought to be available to people who work in the complex, so that they can comment on the impact of these proposed rules on their situation. To do otherwise is really to short change and short shrift the rights of the people that we really are trying to protect and represent.

So, I'm glad to hear that there will be an additional hearing in the field. I think, PACE thinks very strongly that there ought to be more than just one additional hearing in the field. You mentioned that you're going to try and pick a location that makes it most convenient to the greatest number of people.

It's very difficult when you're going from South Carolina and Georgia all the way to Washington State, from the Southwest to the Northeast. I mean, we really should have more than one field hearing. How many? I don't know, but obviously we feel strongly that there should be hearings that are accessible to people who work in this complex.

I would like to request -- I've participated in a number of public hearings on government-proposed

regulations, none at the Department of Energy but certainly at other departments, and I would like to request, if it's at all possible, to have an opportunity after all the witnesses have presented their testimony to answer questions or to make rebuttals of positions that are presented here.

I realize this is a judgment call on your part, and I would also support that this opportunity be granted to all other witnesses, but it's something that I feel would be important to try and make sure that people's viewpoints and positions are clearly understood and represented.

The whole rationale behind the Energy Employees Occupational Illness Compensation Program Act was the failure of workers' compensation at the state level to take care of people who were made ill as a result of their work in defending this country by being involved in the production of nuclear weapons. That's why the Congress acted. That's why the Department of Energy reversed decades of opposition to compensating these workers over the last couple of years and supported the enactment of this law. That's the entire rationale.

Now, we tried, we tried very hard to make

sure that we covered as many occupational illnesses in the Act as we could, and the Congress said no, we're going to limit it to those illnesses resulting from three toxic substances, radiation, beryllium and silica, in a very narrow sense.

What they said beyond that was that we, the Congress of the United States, want to make sure that workers in this complex are compensated, and we're going to do that by telling the United States Government that they're supposed to assist these workers file claims in the appropriate states. Notice what I said, "assist these workers", not erect roadblocks, not attempt to deny these workers their opportunity to collect benefits that they're entitled to.

The law gave you, the Department of Energy, very specific and straightforward tasks. Under Subtitle D, the Congress directed the Secretary of Energy to assist contractor employees whose illness or death may have been related to employment at a DOE facility. Assist contractor employees in filing claims under the appropriate state workers' compensation programs.

Importantly, the Energy Department was not

permitted to oppose these claims and was given important powers to ensure DOE contractors would not fight these claims. That was the rationale, and that is in Subtitle D of the Act.

Unfortunately, the rules that were proposed by the Department of Energy in early September circumvent the intent of Congress in this regard. It's an amazing instance of back-sliding as far as PACE is concerned and, I believe, other unions who represent workers in this complex because these rules will permit the Department of Energy to block the submission of cases, of claims to the physician panels that were created under Subtitle D to determine whether or not the conditions arose out of and in the course of employment.

I'm going to focus very briefly on a couple of aspects of the proposed rules, and I'm going to end up by suggesting that you've missed the essential element of what the law's asking you to do.

The first problem in the proposed rules is the agreements that you are to reach with the states. You have interpreted that under Subtitle D as entitling you to work out arrangements with the states. Is it those agreements or for the specific purpose of

permitting the department to provide assistance to DOE contractor employees? Provide assistance to them in filing claims and state workers' compensation law.

In order to do that, you have to have MOUs with states to give you standing, so that the state will permit you to provide assistance. If you put yourself in the shoes of a state, in the place of a state, all of a sudden, the Federal Government has passed a law saying we're going to help workers with their state workers' compensation claims.

Well, the states, understandably the Congress recognizes, the states are going to want to have an agreement with you, recognizing your right and your responsibility to assist those workers. The states are not going to be anxious and happy about you interpreting their laws.

Now, I don't see anybody in this audience of people who have come to testify from any state agency, but I know in talking to a lot of them, that they're very unhappy about the Department of Energy putting itself up there as some sort of arbiter as to what their law permits or provides. That's not what the Congress intended and that's certainly not what states want.

What the Congress intended was for the Department of Energy to help workers. The rule that you proposed perverts that intent. You want to set forth terms and conditions for dealing with these applications, and the Act does not ask, order or permit the department to do so.

Your agreements with states should simply be an agreement between the Secretary and a state that permits the Department of Energy to provide assistance to those claimants and to provide procedures for such assistance.

The second issue I want to talk about is satisfying state criteria. Where in the statute does the law permit the Department of Energy to screen those applications, where a worker comes into a resource center or calls you or over the Internet or in any other fashion says I have an illness, and I want to file an application to have my case submitted to a physician panel? Where in the statute does it permit the Department of Energy to screen those applications on some sort of basis depending on state law, state criteria?

I have looked. I've looked. I have looked. It ain't in the law, and you shouldn't be doing it, and

you should tell your general counsel or whoever's responsible for that that you can't do it. You have no business interpreting state laws. That's the job of the states.

What this law, what Subtitle D says is for you to assist claimants in their applications, and you do that by making sure that if they meet the criteria in the law, and there are two of them, and the first is whether the applicant has submitted reasonable evidence that the claim was filed on behalf of somebody who worked, who met the requirements of being a covered employee in the system for a DOE contractor, and, secondly, whether or not the illness or death may have been related to employment at a DOE facility. Those are the two issues that you need to determine whether or not they've been met in order for the application to be submitted to a physicians panel.

Decades of experience that we have representing workers with state workers' compensation laws have taught us and have demonstrated very clearly that the states have erected numerous hurdles and blocks to the admission of these claims.

We don't need the Department of Energy to act as a surrogate for the state, not even at the request

of the state, as a surrogate for the state to block these claims.

Panel determinations. The law very simply says the panels, the physician panels to be established under Subtitle D, are to determine whether the illness or death arose out of and in the course of employment. It doesn't say anything about prima facie cases or more likely than not or as likely as not. It simply says arising out of and in the course of employment.

What you need to do in laying down the regulations and the rules for these physician panels is to be helpful to those panels and to make sure that they understand that in determining that question, arising out of and in the course of employment, that they consider all exposures to toxic substances at DOE facilities that contributed to, exacerbated, aggravated or caused the illness or death. That's what the direction, the guidance to the physician panels ought to provide.

Re-examination of physician panel determinations. Your rules go far beyond what the law provides. The law provides simply that the Secretary is allowed to review a panel's determination, to consider the information, relevant and new information

that wasn't reasonably available at the time of the panel's deliberation, and the basis used by the panel to reach its determination, but what you are proposing in the rules is far too open-ended. You're putting in words like quality assurance and any situation that the program office deems or would constitute good cause to submit the determination to re-examination, doubt by the program office that the evidence supports the determination.

The need for consistency. Those words don't exist in the law, and they simply have been put in the regulations from our point of view to allow you to erect further blocks to the determinations, the positive determinations made by panels, and incidentally, before I forget it, I want to make sure that I revisit this state criteria business.

I've talked about our opposition to the department acting as a screen by determining whether or not these applications meet state-specific criteria. In the rules, you also propose that at your request, the physicians panel would have to make a similar determination.

That is just plain wrong, and anyone with an ounce of experience with state workers' compensation

will tell you that physicians are asked to make medical judgments and determinations about causality, not legal determinations about compensability. That does not belong in the rules. It ought to be excised, removed and obliterated from your thought patterns.

Assistance to claimants. I've looked in your proposed rules for instances where you have elaborated on or described in detail the assistance that you, at the direction and the intent of Congress, intend to provide to claimants who are filing applications to have their case go before physician panels, and, unfortunately, I don't find it.

What I find is a request that applicants submit signed releases, so that you can get access to their private medical histories, so that you can get access to their wage histories and so forth and so on, but nothing in these rules indicates clearly what the department will do to provide assistance to claimants who come in and say I need to have my application submitted to a physicians panel. You need to address that question. You need to address it clearly.

The one instance where you do provide some information about assistance you're going to give to claimants is only after their case is approved by a

physicians panels, where a physicians panel has found that their condition arose out of and in the course of employment, and there, you provide assistance, you say you're going to provide assistance in the filing of a state claim, and that you're going to advise your contractors not to contest these claims.

That's an empty promise of assistance, given all of the roadblocks that you've erected prior to that point. So, you need to go back and revisit in the rule the assistance that you're actually going to give to workers, that the Congress intended that you give to workers.

Finally, I want to close by saying you really need to go back here to the law and to look at the central problem. The central problem is how is the Department of Energy going to pay for these claims? Unless you provide guidance in these rules as to how the department is going to shoulder this economic responsibility, we will be back here next year and the year after and a decade and two decades down the road having the same argument and bemoaning the same facts that nobody is getting compensation.

You've got to bite the bullet. You've got to determine within the department how it is you're going

to pay for these claims. Your contractors aren't going to take it out of their current budgets. Insurance companies aren't going to go back on policies that they wrote 20 or 30 years ago and just willy-nilly agree to pay these claims.

You've got to tell the world and workers how it is you intend to pay these claims. Until that's done, nothing positive can be said about really providing assistance to workers who got ill making nuclear weapons that won the Cold War.

Thank you very much. I'd be glad to answer any questions that you have.

MR. CARY: Thank you. Are there any questions?

(No response)

MR. CARY: Regarding your request for rebuttal at the end of the hearing, I'll entertain that for any of the folks here. Once we're through with the speakers that are on the agenda, we'll allow five minutes of additional time, so you can comment or rebut for any of the folks who are here.

MR. ELLENBERGER: Thank you very much.

MR. CARY: The next speaker is George Jones of the Building and Constructions Trades Division for

AFL-CIO.

MR. JONES: Good morning. How are you?

Prior to getting started, there are copies of my statement and the statement that I submitted on behalf of President Sullivan of the Building Trades available for everyone.

Secondly, I'd like to just reiterate something that Jim Ellenberger said. You have your hearings for Yucca Mountain in the state of Nevada, and you have three hearings, plus your set-up on telecommunication and everything, and then you have hearings on a subject that affects the worker, the one that's least able to travel to Washington and everything, and you had the one here, and now you're going to schedule one more.

Please realize the workers don't have the resources to go. You need to have hearings close to where these people live because you won't really hear their story unless you do.

My name is George Jones, and I'm the Government Relations Representative for the Building and Construction Trades Department, AFL-CIO. I have a statement that I'd like to present to you today, and I'm also submitting a more detailed statement on behalf

of President Sullivan of the Building Trades concerning the proposed guidelines.

Our comments are submitted on behalf of all building trade-affiliated international unions and the several hundred thousand members of these unions who have been employed at DOE facilities throughout our country.

I'd also like to let you know that I have firsthand experience working at a DOE facility. I was employed for many years at the DOE Oak Ridge Reservation. I have personally witnessed the dedication of our members to the mission of the department.

Unfortunately, I've also known of the difficulties and problems that our workers have had with illness and the inability for them to receive the appropriate treatment from workers' compensation.

The basic problem with the current proposed rules is that the department is proposing to create the equivalent of a claims adjudication system that is not contemplated by the statute or congressional intent.

The proposed rule inappropriately defers to individual states regarding the rules of causation and as a consequence sets up an unworkable and unfair

system.

The more likely than not criteria for causation moves the goalpost beyond where Congress intended by creating a more stringent barrier for victims to overcome. Congress intended these rules to be a relatively simple and straightforward way for the department to assist workers in obtaining benefits under their state workers' compensation program. They drafted legislation for a physicians panel to determine whether the illness arose out of and in the course of employment.

The statute then authorized the department to pay the claims through a mechanism whereby DOE would instruct the contractor not to defend the claim in the state system, thereby setting the stage for the contractor to bill the cost of that claim back to the DOE.

However, what we have in this proposed rule turns Congress's intent on its head. This rule, if allowed to become final, sets up a system that is almost certainly going to make sure that workers do not receive benefits, that their claims will not be processed or approved, and that in reality would only provide a very narrow window for very few claimants to

receive any benefits.

There are two fundamental areas where we dispute DOE's interpretation of the Act. First, Congress did not intend for DOE to follow state compensation statutes regarding eligibility, causality and timeliness. These deficiencies were acknowledged by the department in public hearings in 2000 and in town hall meetings during the Summer of 2001.

Clearly, Congress recognized that toxic illnesses had been caused by work at DOE facilities and also recognized that the state statutes did not provide the remedies for these toxic illnesses that workers should be entitled to.

Accordingly, we therefore believe that DOE must consider its interpretation of congressional intent and replace its current interpretation with the one which Congress intended; namely, that uniform national standards be established for eligibility and causality that can be applied by the physicians panel and payment of benefits be based on what the state statutes provide, once DOE has accepted the claim based on the findings of the physician panel.

Second. Congress did not intend that DOE contractors or their insurers be responsible for paying

these retroactive claims. In many instances, the contractors no longer exist. This is particularly true for the legacy side.

The DOE position stated in the proposed rule is contrary to interpretation of the statute presented by the department throughout numerous public meetings and hearings, where they clearly stated the intent to find ways to pay for these claims in such a manner that they could not be charged to any contractor or insurer without having some mechanism for identifying or reimbursing the contractors or insurance carriers for these costs.

Accordingly, DOE should withdraw the proposed interpretation of congressional intent and replace its current interpretation with the one which Congress intended; namely, DOE will reimburse contractors or their carriers for any claim payment made under Subtitle D, provided that the contractor or insurance carrier agrees to abide by the intent of DOE Notice 350.6 to accept valid claims.

There are several other matters of concern. Evidentiary requirements. In Section 852.7, the rule defines the burden of proof to be met as being more than likely than not rather than as likely as not

standard used elsewhere in the Act.

The rule provides no justification for this definition, except to say its definition is more consistent with the proof of causation required by the Act's provision for the physicians panels. In truth, the whole rationale of the Act is that DOE imposes toxic hazards on workers, and that DOE uses the state laws to the fullest to deny workers compensations for the illnesses caused by these hazards.

To correct this, the Act as a whole must be seen as a remedy of this history. Therefore, for DOE to pick the more limited of the two standards for burden of proof is inconsistent with congressional intent. The difference between the two standards for purposes of determination of causality may be more theoretical than real.

Nonetheless, DOE, by choosing a standard that clearly gives the impression of being tougher on the claimant, once again sends the wrong message to the claimant and again unnecessarily ratchets up the burden upon the claimant.

The role of the physicians panel. The proper domain of physicians with expertise in occupational medicine is to render a judgment about medical

causation. They are to bring to bear the full knowledge available for all medically-relevant disciplines, such as biology, epidemiology, toxicology and pathology, to the question about the relationship between a set of exposures and subsequent illness. That judgment about medical causation will not vary from state to state because it depends on biology, not on legal or administrative interventions.

Physicians panels should base their decision only on medically-relevant factors. Physicians panels that review DOE claims should not be asked to consider any legal or administrative refinements of causal criteria in making their determination.

Therefore, Section 852.11(b)(4) should be deleted.

The obligation of DOE to assist workers. We'd also like to use this opportunity to raise the important issue regarding the process that DOE has made in fulfilling its legal obligation under Subpart D of EEOICPA to assist DOE workers obtain compensation.

We have serious concerns that the claim-filing and processing systems that are being put into place will not provide the prompt access and resolution that have been promised by DOE.

Resource centers staff are not trained to assemble the information necessary for Subtitle D claims. Claimants have said that they're not receiving necessary assistance in the development of their employment and exposure history, a task that DOE clearly must fulfill under the Act.

Claimants are not being alerted to the state forms that must be completed or to the need to identify an employer for a state claim. Costs to claimants of duplication of medical records are sometimes prohibitive and could be controlled in some states if requested under state workers' compensation guidelines. No process is yet in place for the development of the full occupational histories and exposure records for claimants, an essential DOE responsibility under Subtitle D.

It now appears that the necessary components to move ahead with implementation of Subtitle D of the Act may not be in place until the end of calendar year 2001 at the earliest. In the meantime, claimants may have claims denied in the state workers' compensation system that they may be unable to reopen later.

DOE is charged by the Act with assisting claimants. We urge DOE to provide sufficient staff and

assist the claimants so their claims made under Subtitle D receive prompt and fair consideration.

In conclusion, we believe that the department has sorely missed the mark in the proposed guidelines. The aim of this legislation was to improve the victim's ability to pursue a claim. These proposals, unfortunately, will make it no easier and much more difficult for workers to successfully process a claim at DOE and then in the state system.

The Building Construction Trades Department is committed to not only helping its members but all workers who are employed at DOE facilities and suffered the illnesses that have led to Congress enacting this program.

We are committed to working with the department to achieve a workable set of guidelines for physicians as we are committed to working with the Department of Labor to assure that its part of the program is fair and equitable to claimants.

In closing, it's not part of my statement, but I remember early December last year attending a reception. It was a celebration of this law being passed. It was held over at the Senate Office Building. Fred Thompson provided the chamber, and the

AFL and the Building Trades hosted it. There were many DOE people there. There was a bipartisan representation from Congress, and it was because people thought that with this Act, they had done something good.

Senator Voynavich, I remember, he was really, you know, enthusiastic, and he said, "This is the first piece of legislation I've ever passed that I felt like really benefitted one of my constituents."

Now, we're back here, and we're replowing the same ground. All the issues that are being brought up here so far today were covered in town hall meetings because we foresaw all this coming up with the workers' comp, and it was -- it's taking care of DOE's going to do this and DOE's going to do that, and now we're back to square one, and it doesn't seem fair and that is not fair for the workers.

Thank you.

MR. CARY: Thank you.

Our next speaker is Jeanne Cisco, who's a member of PACE, working at the Portsmouth Gaseous Diffusion Plant.

MS. CISCO: I am Jeanne Cisco. I am a production process operator from the Gaseous Diffusion

Plant in Portsmouth, Ohio.

I am currently serving as the PACE Local 5689 Workers' Compensation Representative. I have worked at the plant for 27 years.

The Department of Energy has recently admitted to exposing our people to toxic exposures for years with little or no monitoring. The exposure data at our plant was found to be omitted, missing and manipulated, which now indicates no statistically significant exposures to our workers.

The Department of Energy representatives have visited the site in the past and heard many tragic stories of our workers and their widows and widowers. These testimonies concern the illnesses that no doubt were as a result of working at the Gaseous Diffusion Plant.

I can understand why the Department of Energy chose one public meeting on this rule which is held miles away from our plant and our workers. You don't want to listen to their cries of protest against these sadly-deficient rules.

Our legislators listened to the past and present workers and worked very hard to enact a law to assist them and their families in their plight. The

law was supposed to relieve the burden of proof of the potential claimant and to minimize the administrative hurdles of the state compensation systems. It was also intended to expedite compensation paid to valid claims.

The spirit and intent of this law was presented to us by the Department of Energy with an open-armed apology across the country and a promise to assist former and sick workers.

The proposed physician panel rule angers me but certainly doesn't surprise me. Since I have worked at the plant for 27 years, I am well aware of the self-regulating practices of the Department of Energy and its contractors. This isn't the first time that I have been to Washington, D.C., in an attempt to appeal to the Department of Energy for a sense of justice.

Our members picketed the Department of Energy during a lengthy health and safety strike in 1979, asking for independent exposure monitoring and an investigation of the Department of Energy's Safety Programs. We were obviously unsuccessful.

As the plant union's workers' compensation representative, I am faced with the task of proving how, when and where our workers were exposed to toxic substances throughout the years in order to support

their workers' compensation claims.

There is little or no documentation of exposures available. The existing health and safety incident reports are incomplete and misleading. I think it is ironic that the Department of Energy is to assist our workers in filing these claims. Our legislators were aware that the Department of Energy and its contractors hold what little history there is of our exposures.

Also, the Department of Energy was aware of the deficiencies of the recordkeeping of the exposures. These same records of exposures, although incomplete with many deficiencies, are now being or planned to be used in workers' compensation hearings against the claimants.

In regards to the proposed physicians panel rule, I wish to speak generally to the rule since the needed changes are too numerous to identify in this testimony. Throughout this rule, the word "shall" has been changed to "must", and in the absence of the definition and the words "assist contractor employee" indicates the Department of Energy simply does not want to assume any responsibility for itself.

The Secretary's review is only to determine

if the applicant was a contractor employee and if the applicant may have a work-related illness. These are the only two determinations authorized before the Secretary submits the application to the physicians panel.

The physicians panel then determines whether the illness or death arose out of and in the course of employment at a DOE facility. The rule states that the Secretary shall assist the employee in obtaining evidence relevant to the panel's deliberations. The assistance should include paying for additional medical exams and expenses to attend these exams as well as any other information the physicians panel would require.

The Secretary shall accept the panel's determination in the absence of evidence to the contrary. This language clearly indicates the burden of proof is on the contractor and not the claimant. We know we have seen the contractor use the incomplete and questionable exposure data against the claimant.

The rule indicates a worker eligible for federal compensation under the Act is excluded from the state compensation for the same illness. The intent of the Act was to ensure all those who apply for federal compensation will be eligible for state compensation.

The rule indicates that the state will set the validity standards for screening applications for submission to the physicians panel. This is not the intent of the Act. The criteria are specific in statute.

The assistance that the Department of Energy should provide is to assure there is documentation of the employee as a contractor employee, what toxic chemicals the applicant was exposed to, when the applicant was employed at the DOE facility, and where and how they were exposed. Also, they should obtain a physicians panel review for documentation of causality and how they based that determination.

The DOE should instruct and enforce the contractors not to fight the claim. The DOE should also ensure that the compensation be paid without the existence of state issues, statute of limitation, latency period issues, exams by inappropriate physicians and any of the other well-known barriers used in state workers' compensation.

The validity of the claim based on the assistance by DOE to prepare the claim is determined before entering the state system for compensation. This evidence should be presented to the applicable

state for compensation per the state laws.

The only issue that should be federal is the use of a uniform causality standard for the medical panel. This should trigger without contest payment for the claim by the DOE's responsible contractor.

As a member of the Worker Advocacy Advisory Committee, I have voiced concern of the unwilling payer on numerous occasions. This is an extremely important issue to many of our nuclear facilities. I find the rule silent on this issue.

It is my understanding that DOE is to step in as the willing payer. It is also my understanding that when a consensus cannot be reached by the physicians panel, the application would automatically be sent to a second panel.

I work with the PACE Worker Health Protection Program at Portsmouth. In reviewing hundreds of medical and work histories obtained from Oak Ridge, the exposures are generally zero. The medical records are written to protect the contractors from workers' compensation claims.

The DOE is literally useless in proving a workers' compensation claim. Our workers do not know the technical issues related to their exposures. They

were not informed of the details of the processes and where the toxic chemicals were located in these buildings, let alone report the details of when and where they were exposed.

Also, the monitoring programs were not adequate in monitoring for long-term low-dose exposures. The indication of the special cohort status not applying to applicants for state claim puts not only us as claimants in the impossible position of claiming something we cannot prove, it puts DOE in an impossible position of adequately assisting these workers in their application for a state claim. This is a necessity before a physicians panel can make a determination. We ask the DOE to do this. After all, they are the ones that hold the key to our known exposure histories.

Thank you.

MR. CARY: Thank you very much.

The next speaker is Richard Miller with the Government Accountability Project.

MR. MILLER: We have two microphones today, I see. Is that because they didn't think I could speak loudly enough without even one?

MS. KIMPAN: We want to hear you twice as

well.

MR. MILLER: Good morning.

My name is Richard Miller. I am employed by the Government Accountability Project, which is a non-profit law firm and public interest organization which represents the interests of workers who have suffered retaliation for raising concerns about the workplace.

We also advocate on behalf of workers interested in the enforcement of health and safety standards and specific acts of whistleblowing, and GAP has a program to track, educate and advocate on issues related to the implementation of the Energy Employees Act to which I will refer hereafter as simply the Act.

GAP has offices in Washington, D.C., and Seattle.

First, I'd like to thank you for holding the hearing today. Although some have requested the Labor Department hold hearings on their rulemaking, we did not get one. We're delighted you've held at least one.

We would, however, request that you hold one at Oak Ridge. There have been numerous requests that at least we have received from folks there who would like to talk to you about the rule, and in Espanola, New Mexico.

That is not to say that behind me there aren't representatives perhaps from Senator Harry Reed's office who would argue there should be one in Las Vegas as well.

Nevertheless, we would at least request that you think about both New Mexico and Tennessee when you look at your list of future prospective hearings.

In Section 852.5 of the rule, the claimants/ applicants must meet three criteria. The first is that it must be filed by or on behalf of a former DOE contractor employee, and this is consistent with the Act.

The second is that the application must demonstrate that the illness or death or at least alleged was related to the claimant's employment, and again that being a responsibility of the physicians panel ultimately, nonetheless was contained within the Act.

Item 3, although DOE was authorized under the Act to enter into MOUs with the state, the regulation says that the MOU with the state will identify the applicable criteria used to determine the validity of workers' comp claims within that state and adopt that criteria for the initial screening process by the

program office.

Well, first, I would just comment at the outset that the specific state eligibility criteria are not in the proposed rule, and we're forced to comment on what we think that criteria will be, rather than having actual knowledge of what the criteria will be. In other words, we're commenting on a black box.

This lack of clarity, I would just underscore, is also in violation of Executive Order 12988 on Civil Justice Reform which states that federal agencies will provide clear legal standard for affected conduct. DOE should publish the criteria listed in each MOU so we can address the MOUs directly one at a time.

Secondly, at the outset, I think it is important to understand that the intent of Congress was to take advantage of the Energy Department's powers of procurement with respect to its contractors.

This rule is not about preempting state workers' compensation law. It's about DOE using its powers of procurement. Unfortunately, the proposed rule contravenes legislative intent to establish uniform federal standards by inserting state worker compensation criteria as a prerequisite for federal

assistance.

Now, this is a real problem where DOE already has control over its self-insured contractors, and it would be very helpful if the department would make public the list of all of its M&O and M&I contractors, perhaps put it in the docket, because it is our understanding that every single one of your M&O and M&I contractors are now today, as we sit here, self-insured at least up to a million dollars per claim.

If that's the case, then DOE already has the power to direct its contractors to stand in and pay these claims, and we don't have to really worry about whether or not we're going to preempt state law here because it's very simple. The statutes in every state permit the employer to simply waive their objection or defense.

Now, as others have stated, this rule defeats the legislative intent by erecting employer defenses under state worker comp law that claimants would already confront without the assistance from the DOE program.

In fact, I can think of no one who would not have already won under an existing state law that will now be eligible for state comp through the assistance

of DOE. Under the proposed rule, DOE's assistance, as others have stated, is not really assistance at all. Rather, DOE has created an unnecessary barrier that will frustrate an already-difficult process, and I challenge DOE, and not particularly the Office of Worker Advocacy but those who are responsible for this rule, to identify the particular cases that would benefit from DOE's assistance, especially where the claimant has already been rejected by the state.

Is there a single case where someone has been shot down by the state where they can now come back to you and get assistance and get benefits under your particular program? I think the answer is there are none.

In the preamble to the draft rule, DOE asserts that the intention of the new federal law was not to create a federal uniform system of eligibility for benefits under state comp laws.

Let me just quote you from the preamble. The rule states, "The Act does not require DOE to prescribe such standards", and "there's nothing in the Act or the legislative history indicating that Congress intended to bypass state law." We disagree, and we will review the legislative history with you.

Before that, let me just distinguish what Congress did not do. Congress did not give DOE specific statutory authority to interpret the standards as up to 50 state worker compensation systems, nor did Congress review the legal authority to condition a physicians panel review upon this, meaning DOE's, federal agency's interpretation of state law.

Furthermore, DOE does not have any legislative direction from Congress to use memorandum of agreements to impose state criteria as a prerequisite to submitting a claim to a physicians panel in order to impose state criteria for occupational causality on a physicians panel.

In fact, the DOE rule defies congressional intent by imposing numerous obstacles contained in the state comp programs that Congress sought to circumvent through the Federal Assistance Program and particularly through DOE's powers of procurement.

As others have noted, in the President's National Economic Council Report, which was issued on March 31st, 2000, declared that state worker compensation systems were found to have numerous limitations with respect to compensating workers for occupational illnesses, and I draw the distinction

between illnesses and injuries.

Additionally, this report found that state worker compensation programs are particularly ill-suited due to statutes of limitations, varying difficult burdens of proof with respect to causation, and proving who's the last injurious employer when there are multiple contractors.

The report was submitted to Congress, and this report served as the foundation for altering DOE's and contractors' posture with respect to challenging state worker comp claims and that's key. The purpose of this law was to change the contractors' posture with respect to challenging state comp claims.

Congress in no respect preempted state comp laws, and instead, it provided a means of working around these laws for a narrow class of contractor employees, and let me just point to some of the congressional testimony that underscores this point.

First, Assistant Secretary of Energy David Michaels, when he testified before the Senate Labor Committee, also known as Health Committee, on May 15th, 2000, stated that "given the inherent differences among state worker comp systems, the National Economic Council Working Group concluded that a DOE contractor

worker cannot expect the same treatment in two states, no matter how similar the illness, the facility, the work and the income rate."

The Bureau of Workers' Compensation for the State of Ohio testified at the same May 15th hearing in Columbus, Ohio. "While we believe workers' compensation should, without a doubt, be regulated at the state level, this specific instance could benefit from federal assistance."

Senator Voynavich stated, when he testified before the House Judiciary Committee, during a hearing on September 21st, that "many of these workers have tried to seek restitution through their state bureaus of worker compensation. Unfortunately, the vast majority of these claims have been denied; denied because state bureau of worker compensation do not have the facilities or the resources necessary to adequately respond to the occupational illnesses unique to our defense establishment."

Senator Voynavich was a lead co-sponsor of this legislation.

Congressman Udall, a lead sponsor in the House, referred to the need for efficient, uniform and adequate systems of compensation. Congresswoman Marcy

Kaptur of Ohio, another co-sponsor, stated, "The only practical compensation program for these workers is a federal program. The numerous differences between state comp programs would result in an inequitable treatment of workers in similar situations. For fairness sake," she said, "a federal workers' compensation program for these workers is imperative."

The congresswoman went on to state that "workers suffering from these diseases are a federal responsibility. They worked in our national defense industry. They suffered because of that work. These Cold War heroes deserve to be compensated for their suffering and their loss and should be compensated equitably. This cannot be done if their compensation is determined under 50 different state laws. Equity demands federal jurisdiction."

And Congressman Ed Whitfield from Kentucky, another lead sponsor, said, "I urge the subcommittee to give these sick workers or their families meaningful compensation packages that acknowledges the damage done and treats their claims in a timely and equitable manner by a government agency that is experienced in processing these types of claims.

My constituents don't understand

jurisdictional problems, and they don't understand why their government seems reluctant to compensate them for illnesses resulting from exposure to hazardous materials they had no knowledge or control over. The government must assume its responsibility."

Then let's go from there to legislative intent because again these are hearing records. These are not necessarily committee reports or the kind of formal legislative history that maybe lawyers would prefer to look at. Let's go to the preamble and the findings of the Act.

In the Act, it says that "state worker compensation programs do not provide a uniform means of ensuring adequate compensation." The law's findings go on to state that "fairness and equity, the government should have an efficient, uniform and adequate compensation system." The purpose in Section 3611 of the Act restates that position, again emphasizing that the compensation programs should be timely, uniform and adequate.

So, when your preamble to the rule states that there is no legislative history to support the contention that you should be establishing a federal standard for causation and applying it to your

contractors and urging them not to contest the claims on a uniform federal basis, that person, whoever wrote that part of the preamble, had not done their homework with respect to legislative history, and we would urge them, whoever they are, to go back and take another look.

Further, there's no legislative history that cancer and beryllium and silica claims, which are handled at the Labor Department, clearly on a uniform federal basis, should be treated one way while all other illnesses are not addressed by uniform criteria as your rule proposes. No where in any of the hearing records or Floor statements does Congress draw that distinction, and I have reviewed every single Floor statement on this subject in the Congressional Record.

Rather, the congressional language speaks broadly to injury and the need for establishing uniformity. Congress's continuous emphasis on the inefficient and inequality of state worker comp systems and the need for the Federal Government to correct that system is established with the statements of the drafters and supporters of this legislation.

Am I running out of time, Steve?

MR. CARY: Proceed.

MR. MILLER: Thank you.

The preamble to the DOE rule, proposed rule, raises an interesting question. How do you address worker compensation claims where the DOE contractor or subcontractor is not self-insured? Because this circumstance seems to lay the predicate for the proposed rule to follow.

First, as we know, there are former DOE contractors and subcontractors who were not self-insured. They were insured through either purchased insurance contracts or through participation in special state funds.

In the past, contractors purchased from people like Aetna and Liberty Mutual, and in these cases, as DOE points out in its preamble, it does not have control over the insurance companies or the special state funds who can contest claims that are deemed work-related by the physicians panel, and for this reason, the rule concludes state law should control the activities and the interpretations of the Energy Department and its panel.

First of all, and as your Worker Advisory Committee has pointed out, DOE can step in to the vacuum in these circumstances and pay the claim. DOE

can reimburse insurers for the cost of paying these claims or DOE can arrange to hold the insurers harmless for the cost of the claim and direct its current M&O or its M&I contractors simply to pay the claims.

These are workable -- okay. These are workable solutions that are not mentioned anywhere in the rulemaking notice, yet this is precisely the advice that DOE has received from its federally-chartered advisory committee.

DOE should also be aware, in fact I'm embarrassed to say because of the people in front of me here today that I need to be advising you, that those at least who will end up reviewing this record should be aware, that its staff who prepared draft rules in June of 2001, which adhered far more closely to legislative intent. These rules called for physician panels to simply review claims after proof of employment had been validated. They didn't require any state criteria to be applied to determinations of eligibility. These determinations, after review by the program office director, would have been binding on the line programs. They would have been binding on the contractors.

Now, I have attached a copy of the June 8th

rule in draft form, what is listed as a panel reg complete draft of 6/8/01, to this particular testimony, and what I would like to know, if you can advise us, that would be fine, and if not, that's fine as well, who in the Department of Energy chose to deviate from the draft approach on the 8th of June which simply adhered to the legislative intent, and that we wound up with the perverted rule, the rule that completely perverts congressional intent, in front of us today.

What happened between the 8th of June and the publication of this rule? Who is specifically responsible for turning the rulemaking on its head and the statute on its head? Which individuals? Which offices? Which political appointees?

Well, the way that can be best accomplished from our perspective is a very simple request for disclosure. We would like to have you place in the public docket all memoranda and documents which led to the development and subsequent rejection of the staff proposal of June 8th of 2001.

Further, we would request the disclosure in the public document of all dockets -- documents which led to the issuance of the proposed rule, including all of the concurrence chains and memoranda that were

associated with them, and all of the options that were given to the decisionmakers, and who they are.

It appears, as Jim Ellenberger before me stated, that this is really about money, that this is about how much is this going to cost, the June 8th rule versus the rule we have today.

In the preamble to the rulemaking, it says that the "estimated cost of this rule in claims paid will be $3 million a year nationwide on average over the next 10 years or about 30 odd million dollars over a 10-year period."

Now, I reviewed the same report by Ashford, Calder, Hattis and Stone of July of 1996 that was submitted to the Department of Energy when it was evaluating changes to worker compensation, and they, in 1995 dollars, estimated that the average fatal cancer case is $240,000, and the average non-fatal cancer case averages $52,000.

I don’t know how many fatal cancer cases are going to get covered with a $3 million-a-year nationwide estimate covering the size population we’re dealing with, but my hunch is that the reason is that there will be very, very few, that this is really about costs, and it’s about how is DOE going to pay for this,

and if the issue is it's discretionary appropriations dollars competing with line program activity, then let's come out and say it, be honest and say how much is it really going to cost to do the June 8th rule? How much is it going to cost to compensate people as Congress had intended?

It's up to Congress to appropriate the funds. Put the ball back in their court. Tell Congress, here's what it's really going to cost, and then if Congress doesn't want to come up with the funds, you're not left catching the spears as you are this morning from the numerous commenters on this rule.

Finally, we would also agree and reiterate that the standard of more likely than not has to be more likely than not defined as caused, contributed, or aggravated or exacerbated the illness or death. To simply say that it is more probable than not that it caused it imposes a legal construct when what we're really dealing with is the question of medical causation, and there should be a distinction drawn in your rule between what constitutes medical causation versus what constitutes a legal invention or administrative invention of causation.

We thank you for your hard work. We know

that the Office of Worker Advocacy has been trying to do a good job, and we appreciate your efforts today.

Thank you.

MR. CARY: Thank you.

The next speaker is Bruce Wood of the American Insurance Association.

Good morning.

MR. WOOD: Thank you, Mr. Chairman.

I'm feeling like the odd man out this morning. My views are considerably different in many respects from the testimony that you've heard so far today, and I think that if I could, I guess, begin where my statement concluded, and I'll go back to my statement, but I think that what you've heard this morning expressing real frustrations with your proposal, and I empathize with you, is a perfect example of poor drafting by the Congress, the raising of expectations, unrealistic expectations about what a statute is intended to do, and in this, I don't -- I'm not blaming the department for what it has proposed.

My comments or really my focus is more directed toward the statute and those who drafted it. I think Subtitle D was very poorly conceived in many respects. In a few respects, it was well drafted, but

in many respects not well drafted and not well thought through. But you're stuck with it, and for now, we're stuck with it, and it's clear that there are many who believe that the statute requires adoption of a federal program, essentially a federal program of state workers' comp.

A few of your witnesses have said no, that really isn't what it does, but clearly they pretty much believe and intend that someone qualifying under the Department of Labor Program, the federal -- the purely federal entitlement aspect of this, should automatically qualify under state, yet that's not what the statute says, and words are hard things to get around, and I think that if there is interest in creating a truly federal program for these workers that preempts state workers' comp law or establishes standards, that is a debate that is not properly before this agency. It's a debate that should take place up the street with full recognition that that debate is really a much broader debate.

It's not just about beryllium exposure or silica exposure. It creates a fundamental issue of federalism, and it creates an issue of federalism with respect to the role of the Federal Government vis a vis

the states with respect to our nation's oldest social insurance system.

We've had this debate before. There are a few of us, like my friend Jim Ellenberger and I and Kate Kimpan, who remember back in the 1970s when there was a decade-long debate about federalizing workers' compensation or setting federal standards for state workers' comp.

The National Commission on State Workmans' Compensation Laws, which issued its report in 1972, set a number of -- made a number of recommendations for the states to adopt, and in the absence of the states meeting some of those recommendations, they deemed essential, that they recommend that the Congress step in and establish federal standards.

Well, there was a debate immediately, without giving the states really any time, there was a debate immediately about that issue. The states improved their programs quite a bit through the 1970s, but there was never any legislation that even got out of either one of the Labor committees.

The employers in this country and in particular saw that as an -- and the states themselves saw that as an improper intrusion into their authority.

Employers saw it properly as a huge cost increase without any kind of offsetting cost reductions, and the issue pretty much died at the end of the 1970s and the early 1980s.

It comes back from time to time in various guises, and this is one of them. So, it is, you know, through that prism that my organization looks at this proposal and looks at Subtitle D and tries to ascertain what in God's name the Congress really meant to do.

It sounds like the Congress really meant to do several things at once. No big surprise there really. But what it didn't do, what it clearly did not do, is intend to preempt state workers' comp laws. Otherwise, it could have clearly done that pretty straightforwardly. No.

It provides a mechanism for certainly at the very least for developing evidence, more information, more data, to help workers down the line in filing their claims, in getting their claims approved, but it doesn't mandate a legal standard. It doesn't mandate that states adopt and incorporate factual determinations made here at the state level. It doesn't mandate that at all, and it certainly, by its terms, does not mandate the states to carry out a

federal program in a manner that would be inconsistent with the 10th Amendment.

Now, the regulations can't prescribe for you may go ahead through your MOUs and implement the statute in that way. That would indeed raise a number of constitutional concerns, 10th Amendment among them. But you need not do that, and I think -- and I'm going to skip through a good deal of this statement rather quickly.

I think that the key role that this agency can play, sort of sifting through all that we've heard here, is to assist in developing the evidence. It's not so much for many of these workers who may have been wrongly denied compensation. It's not so much an indictment of the state comp acts per se. It sounds to me that it's more of an indictment perhaps of this department over the years or its predecessor agencies. It certainly focuses on and spotlights a problem in the development of information, evidence data, that is used in developing a claim.

A mention was made of the President's report, the National Economic Commission report, and it's an interesting report. I don't agree. We don't agree with the premises of -- and the conclusions of that

report, but one of the facts struck me.

While there is a finding in the legislation that stems from a finding in this report that state comp acts don't respond, the report itself states that not many claims are filed.

That raises another interesting question, of course, why claims aren't filed to begin with, but even if they are filed, certainly under any law, unless one is simply going to throw out the window, you know, the rules of evidence and pay anybody just simply based on the fact that they present a piece of paper that says I'm sick, there's got to be some information to support that claim, and if the information isn't forthcoming for various reasons, it's awfully hard for any system, including the state comp system, to respond.

So, I think reading through your proposal, you've tried to do, I think, a good job of bridging the gap, of trying to meet what you see as Congress's strong interest in helping these injured workers but recognizing at the same time that you don't have the authority to simply supersede state comp laws, and I think trying to help workers in developing evidence that may be introduced at the state level, under governing state comp rules of evidence, is an

appropriate function and an appropriate role of this agency.

But I don't think it goes any further than that because I don't think that you have the authority to make legal determinations. I don't think you have the authority to make factual determinations, legal and factual, that are imposed through MOUs on state comp agencies. I don't think that's what the statute says, if nothing else.

But certainly developing the evidence and then at the state level pursuing the state adjudicatory rules, giving the parties a chance to -- and the adjudicatory system to work is an appropriate function.

So, I think that one of the areas I would just point out specifically in the regs that give us some concerns, the agency does not have the authority to override insurance contracts.

An insurance company who writes a policy for an insured contractor writes that policy and establishes the price for that policy, making certain underwriting assumptions based upon its underwriting judgment, its evaluation of perspective laws under that state's comp system.

Under the Tennessee comp system or the Ohio

comp system, the Kentucky comp system, it all differs because the benefit structure and the anticipated loss in that category of employment would differ from jurisdiction to jurisdiction. That's how underwriters do their job. That's how policies are priced.

There isn't the authority to step in and impose contrary to those -- to that contract requirements that force the payment of benefits beyond what was negotiated in that contract. I'm not saying your regulations do that, but as I mentioned in a number of places throughout the statement, if the regulations take the next step in negotiating MOUs, if that's what the MOUs do, then it raises some significant, I think, constitutional problems, regulatory takings of government contracts, due process.

The statute does not lay out, and neither do the regulations, any means for an employer, whether a self-insured employer or an insured employer, its insurer essentially, to participate in the process, the factual development process before the panel of physicians and before the Secretary here.

It is entirely a one-sided process. There is appropriately given a process by which a worker may

appeal a preliminary determination, but there's no process for the other side.

Now, clearly, due process would require, if you're going to take that determination and attempt to impose it through MOUs on the states, due process would require there to be an opportunity for the other side to be able to introduce evidence, contest the relevancy of evidence, cross-examine witnesses, so on and so on.

So, I think if I have any specific recommendation here, one recommendation might be to provide, no matter what else you do, you might provide an adjudicatory process before the panel and before the Secretary, but even that said, even if you were to do that, there is no way, I think, constitutionally under the statute that you can take that determination and simply impose it on the state.

All of the factual determinations, any preliminary legal determinations will necessarily need to be subject to and filter through the normal state workers' compensation adjudicatory system process.

Finally, and I'll conclude, I mentioned before, you know, the raising of expectations, and there is, as I say in the statement, an unfortunate precedent for this with the Black Lung Program, which

goes back many years, and it was first enacted in 1969 to meet what were then considered to be legitimate claims, to pay legitimate claims of victims of coal workers' pneumoconiosis, based upon a finding in Congress that states did not cover CWP.

But the program was supposed to be temporary, just a few years. States were going to improve their programs. The Secretary was going to qualify state programs and that would be it. Well, in just a few years, the whole program took on an entirely different character, became permanent, became a permanent entitlement. Insurer interests were implicated because employer financial interests were implicated, and the program to this day is multi-billions of dollars, hundreds of billions of dollars spent, no end in sight.

One of the driving forces through the development of that program was the raising of political expectations of what the program could provide, it was going to provide, and when those expectations weren't met, there were a lot of mad injured workers and families who marched back up to the Hill and confronted the political patrons of that program to force changes, liberalization, and that was the history of the program through the 1970s, the end

result of which, there was a great example, I think, of constituency politics, whether you favored the program or not, and a perfect example of the adage that says the problem is not that Congress doesn't respond, sometimes it responds too well, is that you have a multi-hundred billion dollar entitlement monster on your hands.

For those who are considering changing the law, whether it's Subtitle D or the rest of it, there is that to bear in mind about raising expectations and what product raising expectations can, you know, produce.

So, with that, I think I will conclude. If you have any questions, I'll be glad to answer them.

MR. CARY: Thank you very much.

The next speaker is Peter Lichty from the University of California.

DR. LICHTY: Good morning.

My name is Dr. Peter Lichty, and I am the Occupational Medicine Manager for the Lawrence Berkeley National Laboratory.

I am here today to present comments from the University of California regarding recently-proposed regulations governing the physician panels created

under the Energy Employees Occupational Illness Compensation Program Act.

With me today are Ellen Castille, Attorney with the Office of the Laboratory Counsel, with legal oversight responsibility for risk management at the Los Alamos National Laboratory, and Bob Perko, Manager of the Staff Relations Division which includes risk management and workers' compensation for the Lawrence Livermore National Laboratory.

As you know, the University of California operates these three Department of Energy National Laboratories. Two of these national laboratories are located in California and one in New Mexico, although we also have employees in other states and the District of Columbia.

Compensating employees for occupational illnesses is not a new activity. Over the years, employees of the University of California at the national laboratories have been compensated for asbestosis, leukemia, beryllium lung disease, chronic bronchitis and other illnesses.

The University of California is perfectly willing to and routinely does accept legal responsibility as defined by the California and New

Mexico labor codes under the jurisdiction of the Workers' Compensation Appeals Board in California and Workers' Compensation Administration in New Mexico.

The California Labor Code established workers' compensation benefits in 1913. Over the years, a variety of adjustments have been made to the Labor Code covering such subjects as apportionment of cumulative trauma claims, including asbestos exposures, compensation for chemical sensitivity, issues in determining legal causation and occupational illness latency periods.

There are no illnesses excluded from the California Workers' Compensation System. The general standard of proof is that an illness must be more likely than not in California or as a medical probability in New Mexico, caused or aggravated by occupational exposures.

As a state agency, the University of California is responsible to the taxpayers for the wise use of their money, and the laboratories are responsible for the use of federal tax dollars. This means that prior to accepting a claim, the university should verify that occupational illness claims were caused by University of California employment.

California state law allows the university to take up to 90 days to verify employment, verify exposure, and seek an expert medical opinion as to causation. Claims that are denied can be appealed to the Workers' Compensation Appeals Board. An administrative law judge decides based on medical evidence questions about illness causation.

The financial costs of workers' compensation claims are funded by a payroll burden. This cost is paid not only by DOE but also by all national laboratory funding sources, both public and private. Currently, for example, the Lawrence Berkeley National Laboratory sets aside for workers' compensation costs 91 cents for every $100 of payroll. This payroll burden rate is established after reviewing the average claims experience for a three-year period after the claims have aged for two years.

For example, in March of 2001, the payroll rate was established after reviewing claims beginning July 1st, 1996, and ending June 30th, 1999. This demonstrates that the effects of increasing workers' compensation costs is not factored in for two years after the claim is filed. In addition, the cost for that claim will be included in all future actuarial

analyses for the life of the claim.

The recent experience of the University of California has been that medical expenses are increasing at a faster-than-expected rate. The most recent payroll burden adjustment was a 17-percent increase, primarily due to this factor. One open cancer claim is currently expected to cost over a $162,000.

The University of California feels that it is inappropriate for the Department of Energy to change our current practice of evaluating workers' compensation claims according to laws established by state legislation and rules developed by state workers' compensation administrations.

These proposed regulations do not recognize the university's right to evaluate new claims. In fact, they allow for the Secretary of Energy to direct the University of California to accept claims. The regulatory language asks the university to accept claims "to the extent permitted by law".

In fact, workers' compensation law does not limit the university's accepting claims. Rather, it permits the university to evaluate claims. Removing the university's right to evaluate these claims would

compromise the university's ability to effectively manage its workers' compensation program.

With regards to the specifics of these regulations, the university would like to make the following points. Section D of the Energy Employees Occupational Illness Compensation Program Act is permissive, not required. The Secretary of Energy had the option to decide not to negotiate the required memoranda of understanding with the 50 states.

We have been told in informational sessions coordinated by Department of Energy Headquarters that DOE intends to enter into memoranda of understanding with the states that would not change state law or regulation. If that is truly the case, then an MOU is not needed, and it will not change the rights of the employee.

In the cases of California and New Mexico, we see no benefit to trying to influence case outcomes under the current state systems. The absence of an MOU would be a continuation of the benefits and rights currently enjoyed by employees and employers in California and New Mexico.

The three laboratories have historically had very few toxic substance workers' compensation claims

go to hearing or trial. In great part, that is attributable to satisfied workers. The laboratories do accept toxic substance claims that appear to be valid under state law. Because the workers get reasonable and necessary medical treatment for their occupational illnesses, they do not find it necessary to litigate.

Much of the proposed regulation discusses how the DOE program office will screen occupational illness claims. We do not see how DOE can accomplish that task. Under the state system, claims are not screened before presentation to the Workers' Compensation Administration.

Claimants are actually evaluated by medical personnel. Each party has subpoena authority to obtain the appropriate past medical records, employment records and each can obtain expert opinions. A legal expert familiar with state law, the workers' compensation mediator or judge, evaluates the evidence, including taking live medical testimony, if necessary.

Evaluating a complicated workers' compensation claim is difficult. We do not believe DOE or any federal agency that is essentially unfamiliar with specific state law and regulation and that is conducting only a paper review can assemble the

evidence required to make a decision about whether any individual claim is valid according to applicable state law and regulation.

The proposed regulations call for the documentation of state criteria for the compensation of occupational illnesses. These criteria, in our opinion, cannot be easily summarized. They are developed over many years by a combination of Labor Code Amendments.

In addition, toxic exposure claims often relate to unique circumstances and exposures where a specific criterion, such as latency for a particular cancer, has never been legally established.

In the proposed rulemaking, DOE asks what standard of proof should apply to claims. State law and each jurisdiction mandates the standard of proof. If DOE is serious about not mandating a change in state law, then the level of standard of proof is not a question open to consideration.

If we had to choose between one of the three alternatives outlined in these regulations, we'd prefer that state officials make any screening decision for DOE according to the complex rules present in each state.

In many states, one area where case law is well established is the sharing of liability for the cumulative exposure to asbestos across multiple employers. This apportionment requires extensive investigation into past employment records and evaluation of past exposures. DOE will not have the authority under these regulations or the resources to collect these records.

The University of California, including the university's national laboratories, has always accepted workers' compensation claims we believe to be valid under applicable state law. We currently have open claims on asbestosis, chronic bronchitis, beryllium lung disease and leukemia, among others.

The state systems under which we operate give due process in the consideration of these claims. Our primary request today is that the due process currently in place be continued and not be biased by federal pressure.

Additionally, this matter should be of great concern to taxpayers who, depending on the system, pay for workers' compensation claims through their federal or state taxes or through both their federal and state taxes.

Workers who incurred illnesses as a result of their work for the government should be and are entitled to reasonable and necessary medical treatment and, if appropriate, indemnification benefits. Taxpayers, however, should not be overburdened by paying for claims that are not valid under state law.

Thank you.

MR. CARY: Thank you very much.

That's the end of the speakers who have preregistered. Were there other speakers who wanted to provide testimony before we get into the comment and rebuttal section?

(No response)

MR. CARY: All right. Well, that makes it easy then. I'll entertain then five minutes for individuals with organizations who'd like to make additional comments or rebuttal.

I know, Jim, you mentioned that -- before you come up, were there others interested in that as well? Richard. Anyone else?

Further Oral Statements in Rebuttal

MR. ELLENBERGER: Thank you, Mr. Chairman.

I want to start out by revisiting my earlier comments, and I want to assure this panel that although

we feel strongly, we in PACE feel strongly about the proposed rules, our comments are not directed in any way directly at this panel or at Environmental Safety and Health.

We look at this in terms of what the Department of Energy's proposing and the manner in which I represented the viewpoints of PACE International should be viewed in that light and in that regard. It has nothing to do with personal and individual identities. It has everything to do with what the department is proposing and hope you take it in that context.

I was glad that Bruce Wood raised the issue of the National Commission on State Workmans' Compensation Laws, which was chaired by John Burton. Professor Burton is a member of the Public Advisory Committee to the Department of Energy's Office of Worker Advocacy. Dr. Burton was appointed Chair of the National Commission by Richard Nixon in 1970.

That Commission, which was comprised of representatives from labor, from management, from academia, even had a representative from the National -- excuse me -- from the American Insurance Association, that Commission unanimously endorsed 84

recommendations, 19 of which were said to be essential to state workers' compensation, and that Commission said if the states didn't adopt those 19 essentials by 1975, that the Congress and the Administration should come in with federal standards to ensure compliance, to make this a fair system for workers.

The record shows that the level of compliance with the 19 essentials in 1975 was about the level of compliance in 2001. It's less than 67 percent or around 67 percent. That's a failing grade in any school that I attended.

But now, we have a lot of escaping and abandoning of the positions taken by the National Commission. People from 1975 onward have been jettisoning the recommendations for federal standards and that was evident here this morning.

We're not here to debate the principles of and the desirability of the fair and equitable social insurance system, the oldest in our country, which is workers' compensation. We're here to talk about a fair and just system for these workers who worked in our nuclear weapons complex and that's what the Congress addressed, and the Congress told us, and Richard Miller demonstrated this clearly, that they understood the

shortcomings of state workers' compensation, and while they weren't intending to federalize in any way, shape or form the operation of state workers' compensation, they were fashioning a federal response which was going to make sure that workers in the system were treated fairly and compensated for diseases that arose in the course of and out of their employment. That's what we're here talking about.

Now, I listened to the testimony from the University of California. I am a native of California. My father, who's still living, has asbestosis. He had an asbestos claim not against the University of California, but he had an asbestos claim, and he had to go to court to get compensation from the California State Fund, and I can guarantee you that there isn't an employer in California who voluntarily accepts asbestos claims. They're all contested.

Almost every occupational illness claim in California is contested. There is an entire industry that's grown up around the medical/legal battles that go on in California's workers' compensation system.

The Congress of the United States wanted to avoid that, and so they came up with this law which we -- you're having difficulty trying to fashion in an

appropriate way to work for individuals who are covered, and we're trying to help you, but we can't go back to the state system which has historically served to block these claims and will do so in the future if we allow them.

That's why the Congress said if these claims go through these physician panels and are found to be related to and in the course of employment, then they should be accepted by the Secretary and the Secretary should use all the powers in the Secretary's arsenal to ensure that its contractors don't contest these claims.

Very difficult task, but one we feel can be done, and it can only be done if you bite the bullet and determine that you can -- you're going to pay for these claims because if we go back to the University of California or the members of the American Insurance Association and try and put this financial burden on them, we are going to be in for a long and very difficult and probably unsatisfactory battle for all of us.

We need to find a solution to help these workers.

MR. CARY: Thanks, Jim.

Richard?

MR. MILLER: Thank you for providing an opportunity for rebuttal.

I just want to respond so that the record's clear. There's no 10th Amendment question involved under a memorandum of agreement if the state doesn't sign it. There's no imposition of memorandum of agreements. The word "agreement" implies that you have two parties at least to the agreement. If it's not, it's not an agreement, and so I think it's a phony issue to raise that constitutional question.

Secondly, with respect to the question that was raised and perhaps this is the right time to do it, the National Economic Council report was mentioned by Mr. Wood. I don't know whether it would be difficult for your office to incorporate that into the record of this hearing or whether we need to do that in order to get it on the record.

I know it's on your website. Maybe we incorporated it in the record by reference to your website. I don't know how things are done in this new modern era of rulemaking, but the National Economic Council report speaks for itself, and it doesn't need to be characterized by Mr. Wood as in the way in which he did. He questioned, for example, why is it that

claims aren't filed?

Well, the reason claims aren't filed is that people are deterred from running their heads into a brick wall. It's human behavior, that if your probability of success is low, and there's risks of retaliation in some cases, you don't bother, and if you have a choice between bringing a worker comp claim and jeopardizing perhaps your own health insurance, where those claims will not be paid under private health insurance because they're work-related, people are not going to jeopardize private health insurance, even though they may end up having to pay the deductible and/or co-payments. That's a lot cheaper than getting zeroed out all together when you declare your illness is work-related.

Lastly, with respect to his assertion that there's inadequate data, he's exactly right. Congress declared there was inadequate data. Senator Thompson's hearing that he held before the Senate Government Affairs Committee well documented that there's insufficiency of data.

Then the question becomes, well, if there's no data upon which to adjudicate, the question was posed, these claims must not be merited or they can't

meet the sufficiently legal standard.

Well, where DOE can step in and where the Office of Worker Advocacy can step in, I think, constructively, is through either risk mapping, dose reconstruction. It is possible to re-evaluate previous work environments through using whatever documentation exists along with worker histories and that's really where the department has a responsibility to step in.

We don't have that going on on the DOE side, the way, for example, NIOSH is undertaking an extensive dose reconstruction process with respect to radiation.

And finally, there was this whole question that Mr. Wood raised about the Fifth Amendment takings and impairment of contracts, and I just want to respond on that point.

No where do we suggest nor no where should DOE engage in impairment of contracts by ordering insurance companies to make payments which they can't make them pay under their insurance contracts.

The idea here is that using your powers of procurement, you will simply step in and tell your current M&O or M&I contractor who is self-insured to pay the claim.

Now, if the insurance company wants to go

litigate a dispute where they will not have a legal obligation to pay, that's up to them to tell the court why they should have standing in that litigation and let them litigate against, you know, a hypothetical.

I don't think they'll wind up having much success suing because they want to prevent, for example, adverse precedent of payment of these claims in these circumstances which might arise in another setting.

So, I would just argue that there is no Fifth Amendment takings question here contemplated by Congress or through the MOUs. The only purpose of the MOUs was simply to try to get an understanding that if you direct your contractors not to contest the claim, and the states receive a notice from the respective employer in that given state that they don't wish to contest a particular claim being filed because they've been directed by DOE not to do so and will be reimbursed accordingly, then that should end the inquiry.

There's no constitutional question there. There's no imposition. There's no impairment of contracts, and there's certainly no 10th Amendment question.

Thank you.

MR. WOOD: May I respond to that?

MR. CARY: Yes. Yes, you may.

Were there others who wanted to comment and rebut as well or no?

(No response)

MR. WOOD: I'm not a constitutional lawyer either, but I think that there are some real issues here of a constitutional dimension. Again, I'm not suggesting that they are facial either in the statute or in the regulation but could arise in the application of the regulation.

Under the 10th Amendment, Congress is prohibited from commandeering states to adopt or to implement federal policies. Under the 10th Amendment, they cannot compel the states to legislate, state legislatures to enact laws implementing federal policies, and they can't force state executive officials to administer federal statutory requirements.

There's nothing on the face of this that compels them to do that. Yes, you may enter into a -- a state official may enter into an MOU, that is voluntary, but in doing so, that still -- that state official's authority to do so is still grounded in what

authority he may have and only what authority he may have under state law.

With respect to the comments made about regulatory takings or due process, you know, the -- an insurance -- an employer, if not self-insured, is required under state workers' comp laws to secure coverage for all liability under that state's comp act. All employers are. They can either self-insure or they can go to the insurance company, as most do, and get a policy of insurance.

The contract, therefore, as I said, is underwritten and is priced to assume the prospective liability, prospective loss, during the term of that policy as an estimate of loss under that state's comp law.

The contract the insurer has is with the employer, the policyholder. It's not with the Department of Energy, and I don't see how the Department of Energy can commandeer/command an insurance company to simply stand down from its contract.

The contract says to pay all benefits when due, and when due implies a lot of things, when legally due. Has the injury arisen out of and in the course of

employment under that state's workers' comp law? Has the claim been filed past the statutory period? The statute of limitations?

If the claim is compensable, if it did arise out of and in the course of employment, what kind of -- has there been earnings loss? What form of medical treatment is required? What expenditure must be made for that? All of that is inherent in the term "when due". It defines the legal rights under the contract.

Even assuming that the Department of Energy can step in and say to the insurer, never mind about that contract, we're just going to pay everything, that's going to have an adverse impact on that employer, that insured employer. It's going to have an impact on the rating of loss, perspective loss under that state's comp law because for those employment classifications, under the rating system, the classification system, there will suddenly be a much higher incidence, a much higher frequency of loss, estimate of loss or severity as the term of art is, total cost of loss.

Why? Because, well, the Department of Energy is saying don't worry, we'll pay everything. Is the department also willing to reimburse the contractor,

the insured contractor for his workers' compensation premiums? Because with the estimate of loss going ever more skyward, those premiums are going to increase as well, and the employer is certainly still obligated under state law to continue securing coverage of benefits under that state law.

There is nothing here in the Act or in the regs that alters that requirement. So, suddenly you're going to have much higher frequency, much higher severity, much higher -- far higher rates. That employer's experience under the -- what's known as the Uniform Experience Rating Plan will adversely in fact affect that employer's experience.

So, there are all kinds -- what I'm saying is there are all kinds of complications down the road if you accept a policy, adopt a policy of even in simply reimbursing, let alone somehow forcing payment of benefits that aren't due under the contract, that aren't due in the evaluation of prospective loss under the terms of that state comp law.

So, that's -- I have to continue to disagree with the -- you know, both, you know, Jim's comments and the comments of Mr. Miller on that.

MR. CARY: Thanks very much.

I'd like to thank you all for your comments and for your testimony. There are many thorny issues in this rule, and we're very -- it's very useful for us to get your input.

As I mentioned, we'll be having another hearing later this month and shortly, we'll be releasing the time and the location.

Once again, thank you very much for your participation.

(Whereupon, at 12:30 p.m., the meeting was adjourned.)